

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES McMILLAN, :

Plaintiff, :

-against- : **DECLARATION**

NEW YORK STATE BOARD OF ELECTIONS, :

Defendant. :

-----X

ANNA E. SVIZZERO, under penalty of perjury, declares
as follows:

1. I am the Director of Election Operations at the New York State Board of Elections (the "State Board"), a position in which I have served since 1992. The State Board is an agency of the Executive Department of the State of New York pursuant to N.Y. Election Law § 3-100(a).

2. I am fully familiar with the facts and circumstances surrounding James McMillan's ("plaintiff") application for a "recount" of the 2010 gubernatorial election. I respectfully submit this declaration in opposition to plaintiff's application, dated January 23, 2010, and in response to this Court's order directing the State Board to show cause "why a recount should not be ordered of all ballots (absentee or otherwise) from the 2010 election for Governor of New York in which Jimmy

McMillan ["plaintiff"] was a candidate," as per this Court's Minute Entry entered on January 24, 2012.

3. The Election Law contains numerous provisions concerning the counting - "canvassing" - and recanvassing of ballots. This declaration will refer to provisions relevant to plaintiff's present application.

4. This declaration also provides the Court with copies of three exhibits, from the files of the State Board, with which I am personally familiar, pertaining to plaintiff's application for what he calls a "recount" of the results in the November 2010 gubernatorial election. The Election Law term is "recanvass."

5. As demonstrated below, another recanvass is unwarranted because the 57 county boards of election and the New York City board (the "city board") were already required by statute to conduct a recanvass. Plaintiff did not challenge that process, and a second recanvass would impose an enormous financial and administrative burden on the local boards and the city board - an unnecessary undertaking which the State Board does not support.¹

6. All 4,763,688 ballots cast in the 2010 gubernatorial election, including blank and void ballots,

¹ The State Board itself has no voting machines. Elections are conducted, and votes are canvassed, at the local level, i.e., the 57 county boards and the city board.

were required to be recanvassed within 15 days after the election, per N.Y. Election Law § 9-208.

7. Section 9-208(1) provides, in pertinent part, as follows:

Within fifteen days after each general . . . election, . . . the board of elections, or a bipartisan committee of or appointed by said board shall, in each county using ballot scanners, make a record of the serial number of each ballot scanner used in each election district in such general . . . election.

* * *

Such board of elections . . . shall recanvass the tabulated result tape from each ballot scanner used in each election district by comparing such tape with the numbers as recorded on the return of canvass. The said board . . . shall also make a recanvass of any election day paper ballots that have not been scanned and were hand counted pursuant to [N.Y. Election Law § 9-110(2)] and compare the results with the number as recorded on the return of canvass.

The board . . . shall then recanvass write-in votes, if any, on ballots which were otherwise scanned and canvassed at polling places on election night. The board . . . shall validate and prove such sums.

Before making such canvass the board of elections, with respect to each election district to be recanvassed, shall give notice in writing to the voting machine custodian thereof, to the state and county chair of each

party or independent body which shall have nominated candidates for the said general . . . election . . . and to each individual candidate whose name appears on the office ballot, of the time and place where such canvass is to be made; and the state and county chair of each such party or independent body and each such individual candidate may send a representative to be present at such recanvass. Each candidate whose name appears on the official ballot, or his or her representative, shall have the right personally to examine and make a record of the vote recorded on the tabulated result tape and any ballots which were hand counted.

8. Further, pursuant to N.Y. Election Law § 9-209, the local boards of election are required to canvass absentee, military, special and any other ballots which may not yet have been canvassed. As with the recanvass, this canvass provision also requires that notice be given to candidates and others therein identified, of the date, time and place of such canvass.

9. In addition, pursuant to N.Y. Election Law § 9-211, the local boards of election were required to conduct mandatory audits of 3% of their voting machines, as an additional safeguard to ensure an accurate election was conducted using optical scan voting systems.

10. As required by State Board regulations, applicable statewide, set forth at 9 NYCRR 6210.18(b), local boards of election were required to notify all

candidates of the "date, time and location" of the local mandatory audits.

11. Furnished herewith as Ex. A is a copy of a template the State Board provided to the local boards of election and to the city board. The template, entitled "Notice to Candidates and Party Chairs," concerns (1) the opportunity to inspect the voting equipment, (2) notice with respect to the initial canvass of absentee, special and affidavit ballots, (3) re-canvass by the boards, and (4) the post-election audit. All candidates were invited to participate in these activities so that so that they might be satisfied about the fairness of election processes.

12. Ex. B to this declaration is a copy of a "Notice to All Candidates," dated October 12, 2010, provided by the city board to the State Board, in which the city board informed all candidates about (1) a test of the scanners, (2) inspection of election day paper ballots, (3) the BMD audio ballots, (4) the board's random draw of scanners for audits, (5) the audit of the scanner results, and (6) the canvass and/or recanvass of poll site ballots, emergency ballots, absentee, military and special federal ballot.

13. Ex. C to this declaration is a copy of the schedule of the 57 local boards of election and the city board informing the candidates about the date of the 3%


audit drawing, the date of the 3% audit, the date of counting absentee ballots, and the date of recanvass of votes cast on scanners.

14. The State Board has not been informed by any local board, including the city board, that plaintiff complained that he was denied the opportunity to participate in the testing and canvassing processes described above.

15. Finally, another recanvass of the results of the 2010 gubernatorial election as requested by plaintiff would require that the 57 county boards and the city board hand recanvass 4,763,688 paper ballots. With the new optical scanner voting machines, all ballots are now cast on paper. To hand recanvass nearly five million paper ballots would be a tremendous burden and expense for the local boards and inappropriately interfere with their vital activities to prepare for four, or in some instances five, separate elections between now and November 2012: (1) special elections in March, (2) the presidential primary in April, (3) the congressional primary in June, (4) the state legislative primary in September, and (5) the general election in November.

WHEREFORE, the State Board respectfully requests that plaintiff's application be denied in its entirety, and that this Court grant such other and further relief as it may deem just and proper.

I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746(2), that the foregoing is true and correct.
Executed on February 16, 2012.



ANNA E. SVIZZERO
Director of Election Operations
New York State Board of Elections

CERTIFICATE OF SERVICE

JOEL GRABER, an attorney duly admitted to practice in the State of New York and before this Court, certifies under penalty of perjury that on February 21, 2012, he caused the within DECLARATION AND EXHIBITS to be served upon the following plaintiff *pro se*:

VIA EXPRESS MAIL/OVERNIGHT DELIVERY:

James E. McMillan III
1996 Nostrand Ave.
Brooklyn, NY 11210-1547

AND VIA E-MAIL:

rentisto@aol.com

Dated: New York, New York
February 21, 2012

A handwritten signature in black ink, appearing to read 'Joel Graber', written in a cursive style.

JOEL GRABER
Special Litigation Counsel
State of New York

Notice to Candidates and Party Chairs

This correspondence will serve to advise you that you or your representative may attend any or all of the following Board of Elections activities:

Viewing Voting Systems: You will have an opportunity to inspect voting machines and ballot marking devices to be used in the upcoming Primary/General Election and witness the conduct of test ballots being cast, to confirm the accuracy of the scanner. This pre-election testing will take place on _____ (insert day, date, year, time and location of where your test decks will be run and machines may be viewed). Pre-election testing will continue daily, between the hours of _____AM and _____PM, until all pre-election testing has been completed.

Canvass of Absentee, Special and Affidavit Ballots: The canvass of absentee, special and affidavit ballots will begin on _____. (insert day, date, year, time and location of where your canvass will take place) The canvass of these ballots will continue daily, with ____ teams conducting the canvass, between the hours of _____AM and _____PM, until all ballots have been canvassed.

Recanvass: The recanvass of all voting machines will begin on _____ (insert day, date, year, time and location of where your recanvass will take place) This recanvass will continue daily, with ____ teams conducting the recanvass, between the hours of _____AM and _____PM, until all voting machines have been recanvassed.

Post-Election Audit: The post-election audit of randomly-selected voting machines will begin on _____. (insert day, date, year, time and location of where your canvass will take place) This audit will continue daily, with ____ teams conducting the audit, between the hours of _____AM and _____PM, until all selected voting machines have been audited. The drawing which will randomly select the voting machines that must be audited will be take place on _____ (insert day, date, year, time and location of where your drawing will take place)

RECAP: (Insert dates and times here for a helpful, quick reference for candidates and party leaders)

Viewing Voting Systems:

Canvass:

Recanvass:

Post-election Audit

A

JULIE DENT
PRESIDENT
JUAN CARLOS J. C. POLANCO
SECRETARY

JOSE MIGUEL ARAUJO
NAOMI BARREIRA
NANCY MOTTOLA-SCHACHER
MICHAEL J. RYAN
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
FREDERIC M. UMANE
COMMISSIONERS



BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

GEORGE GONZALEZ
EXECUTIVE DIRECTOR

DAWN SANDOW
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

TROY JOHNSON
COORDINATOR

NOTICE TO ALL CANDIDATES

October 12, 2010

TO: All Persons who are Candidates in the November 2,
2010 General Election and Special Election:

Pursuant to the applicable provisions of the Election Law of the State of New York, the Rules and Regulations of the New York State Board of Elections and the Rules, Regulations, Policies and Procedures adopted by the Commissioners of Elections in the City of New York, please take notice of the following information:

All activities relating to any type of absentee, military, federal or affidavit ballot will be conducted at each Borough Office of the Board of Elections (locations of which are set forth in Schedule A).

All activities relating to the pollsite voting system will be conducted at each Borough Voting Machine Facility of the Board of Elections (locations of which are set forth in Schedule B).

6-1

1. **Optical Scanning System Test Absentee, Federal, Military, Affidavit Ballots**

Pursuant to the provisions of New York State Board of Elections Rule 6210.11, you or your representative designated in writing may attend a test of the optical scanning system used to canvass and/or recanvass absentee/federal/military and affidavit ballots used in the November General. You or your representative designated in writing, may appear and observe the test(s) in the applicable Borough(s) where you are a candidate, which will be conducted in accordance with the following schedule:

<u>BOROUGH</u>	<u>DATE & TIME OF TEST</u>
<u>New York</u>	<u>Monday, October 25, at 10:00 AM</u>
<u>Bronx</u>	<u>Tuesday, October 26, at 10:00 AM</u>
<u>Brooklyn</u>	<u>Wednesday, October 27, at 10:00 AM</u>
<u>Queens</u>	<u>Thursday, October 28, at 10:00 AM</u>
<u>Richmond</u>	<u>Friday, October 29, at 2:30 PM</u>

2. **INSPECTION OF ELECTION DAY PAPER BALLOTS**

Pursuant to the provisions of Section 7-128(1) of the NYS Election Law, you or your representative designated in writing may inspect the paper ballots to be used in the November 2, 2010 General Election on **Thursday, October 21, 2010 between the hours of 10:00 A.M and 3:00 P.M.**

Note: This inspection will take place at the Borough Voting Machine Facility, **not** the Borough Office.

3. **BMD AUDIO VERSION OF THE BALLOT**

The Board of Elections in the City of New York will be placing Ballot Marking Devices (BMD's) in all of the pollsites for use by voters, including those with disabilities in each of the pollsites in the November 2, 2010 General Election.

BMD marks a ballot which is scanned on election day, second BMD affidavit ballots are verified and secured, and tallied at a later date.

Voters using the BMDs may choose an audio version of the ballot. Candidate names in English and Spanish, and transliteration of candidate names in Chinese and Korean will be made by Board of Elections staff in identified election districts under the Voting Rights Act.

As a candidate you have an opportunity to review this recording of your name and either approve it, or immediately provide an alternate version. Said review will be conducted on Friday, October 22, 2010 from 10:00 AM until 5:00 PM.

This review will take place at the Board of Elections Executive Office located at 42 Broadway, on the 7th floor in Manhattan.

4. RANDOM DRAW OF SCANNERS FOR AUDIT

New York State Election Law (Section 9-211) requires an audit of pollsite scanners used on Election Day. The selection of scanners for this audit is done by random draw. The draw of scanners will be held on WEDNESDAY, NOVEMBER 3, 2010 at 10:00 A.M. at 42 Broadway 6th floor.

5. AUDIT OF SCANNERS

This Audit will begin at each Borough Voting Machine Facility (See Schedule B) on THURSDAY, NOVEMBER 4, 2010 at 10:00 A.M. and continue until completed including Saturday and Sunday.

6. CANVASS AND/OR RECANVASS OF VOTES CAST

a. Pollsite Ballots

Pursuant to the provisions of Sections 9-200 and 9-208 of the NYS Election Law, you or your representative designated in writing may be present and observe the recanvass of votes cast on the Pollsite Voting Systems and the canvass of any and all write-in votes cast on the Pollsite Voting Systems. This canvass/recanvass will commence on **WEDNESDAY, NOVEMBER 3, 2010 at 10:00 A.M.** and will continue until such canvass/recanvass of all the Pollsite Voting Systems is completed including Saturday and Sunday.

The Board of Elections will have teams of bi-partisan staff to conduct the canvass/recanvass. You may appoint one watcher for each bipartisan team. This canvass/recanvass will take place at each Borough Voting Machine Facility (See Schedule B).

b. Emergency Ballots

Pursuant to the provisions of Sections 9-200 and 9-208 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass or recanvass of any emergency and BMD ballots votes cast on Election day. This canvass and recanvass will commence on **WEDNESDAY, NOVEMBER 3, 2010 at 10:00 A.M.** and will continue until completed including Saturday and Sunday. This canvass/recanvass will take place at each Borough Voting Machine Facility (See Schedule B).

c. Absentee, Military, Federal and Affidavit Ballots

Pursuant to the provisions of Sections 9-200 and 9-209 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass of votes cast on any and all valid absentee, military, federal and/or affidavit ballots. This canvass will commence on **WEDNESDAY, NOVEMBER 10, 2010 at 10:00 A.M.** and will continue until completed, including Saturday and Sunday. The Board of Elections will have teams of bi-partisan staff to conduct the canvass/recanvass. You may appoint one watcher for each

bipartisan team. This canvass/recanvass will take place at each Borough Office (See Schedule A).

If you have any questions or require additional information, please contact the Chief Clerk / Deputy Chief Clerk from your respective borough office.

Thank you for your cooperation and understanding in these matters.

Very truly yours,

Troy Johnson
Coordinator,
Candidate Records Unit

Attachments (Schedules A& B)

SCHEDULE A

Manhattan Borough Office

200 Varick Street – 10th Floor
New York, NY 10014
212 - 886-2100

Gregory Lehman, Chief Clerk
Timothy Gay, Deputy Chief Clerk

Bronx Borough Office

1780 Grand Concourse – 5th Floor
Bronx, NY 10457
718 – 960-0730

Anthony Ribustello, Deputy Chief Clerk
Anna Torres, Deputy Chief Clerk

Brooklyn Borough Office

345 Adams Street – 4th Floor
Brooklyn, NY 11201
718 – 797-8800

Diane Haslett-Rudiano, Chief Clerk
Maryrose Sattie, Deputy Chief Clerk

Queens Borough Office

126-06 Queens Blvd.
Kew Gardens, NY 11415
718 – 730-6730

Barbara Conacchio, Chief Clerk
Katherine A. James, Deputy Chief Clerk

Staten Island Borough Office

1 Edgewater Plaza – 4th Floor
Staten Island, NY 10305
718 - 876-0079

Sheila DelGiorno, Chief Clerk
Anthony Andriulli, Deputy Chief Clerk

SCHEDULE B
VOTING MACHINE FACILITIES

MANHATTAN

450 West 33rd Street
New York, NY 10001
212 - 465-0503

BRONX

1780 Grand Concourse (Levels 2 and 3)
Bronx, NY 10457

BROOKLYN

5112 Second Avenue
Brooklyn, NY 11232
718- 492-2607

QUEENS

66-26 Metropolitan Ave
Middle Village, NY 11379
718 - 417-2026

STATEN ISLAND

1 Edgewater Plaza
Staten Island NY 10305
718 - 876-0719

Candidate Notifications - General 2010

	Date of 3% Audit Drawing	Date of 3% Audit	Date of Counting Absentee Ballots	Date of Recanvass of Votes Cast on Scanners
ALBANY	November 9	November 9	November 10	November 4
ALLEGANY	November 8	November 8	November 9	November 9
BROOME	November 4	November 8	November 9	November 9
CATTARAUGUS	October 29	November 5	November 15	November 8
CAYUGA	November 3	November 3	November 9	November 8
CHAUTAUQUA	November 4	November 4	November 4	November 4
CHEMUNG	November 5	November 5	November 9	November 9
CHENANGO	November 8	November 8	November 9	November 9
CLINTON	November 9	November 9	November 9	November 4
COLUMBIA	November 4	November 4	November 16	November 4
CORTLAND	November 5	November 5	November 9	November 5
DELAWARE	November 8	November 8	November 9	November 9
DUTCHESS	November 8	November 8	November 15	November 10
ERIE	November 9	November 10	November 12	November 12
ESSEX	November 5	November 5	November 10	November 3
FRANKLIN	November 5	November 5	November 10	November 10
FULTON	November 16	November 16	November 5	November 5
GENESEE	November 9	November 9	November 9	November 9
GREENE		November 17	November 2	November 10
HAMILTON	November 4	November 4	November 9	November 3
HERKIMER	October 30	November 4	November 9	November 9
JEFFERSON	November 5	November 8	November 15	November 15
LEWIS	November 8	November 8	November 10	November 12
LIVINGSTON	November 8	November 8	November 15	November 5
MADISON	November 5	November 5	November 9	November 5
MONROE	November 5	November 5	November 2	November 5
MONTGOMERY	November 15	November 18	November 9	November 3
NASSAU		November 17	November 10	
NYC				
BRONX	November 3	November 4	November 10	November 3
KINGS	November 3	November 4	November 10	November 3
NEW YORK	November 3	November 4	November 10	November 3
QUEENS	November 3	November 4	November 10	November 3
RICHMOND	November 3	November 4	November 10	November 3
NIAGARA	November 5	November 8	November 9	November 8
ONEIDA	November 10	November 10	November 9	November 9
ONONDAGA	November 2	November 9	November 17	November 8
ONTARIO	November 8	November 8	November 9	November 9
ORANGE	November 3	November 5	November 16	November 8
ORLEANS	November 8	November 8	November 15	November 8
OSWEGO	November 5	November 8	November 9	November 5
OTSEGO	November 9	November 9	November 9	November 9
PUTNAM	October 26	November 4	November 9	November 4
RENSSELAER	November 16	November 16	November 8	November 8
ROCKLAND	November 10	November 10	November 9	November 3
ST. LAWRENCE	November 4	November 4	November 16	November 4
SARATOGA	November 4	November 4	November 10	November 4
SCHENECTADY	November 4	November 4	November 8	November 4
SCHOHARIE	November 8	November 8	November 17	November 5
SCHUYLER	November 10	November 10	November 12	November 9
SENECA	November 3	November 3	November 9	November 4
STEUBEN	November 4	November 4	November 16	November 5
SUFFOLK	November 8	November 8	November 8	November 3
SULLIVAN	November 8	November 10	November 12	November 5
TIOGA	October 29	November 5	November 8	November 8
TOMPKINS	November 8	November 8	November 4	November 8
ULSTER	November 10	November 10	November 10	November 10
WARREN	November 3	November 3	November 9	November 3
WASHINGTON	November 3	November 3	November 9	November 3
WAYNE	November 5	November 5	November 15	November 5
WESTCHESTER	November 8	November 8	November 2	December 9
WYOMING	November 9	November 9	November 10	November 5
YATES	November 4	November 4	November 10	November 10

(H)

TOTAL 5,115